Filed 11/16/09 P. v. Pogue CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

TRAVELL DARNELL POGUE,

Defendant and Appellant.

F056268

(Super. Ct. No. BF116948A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

A.M. Weisman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Brook Bennigson, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found Travell Darnell Pogue guilty of attempted murder, first-degree burglary, and assault with a deadly weapon. On appeal, he argues ineffective assistance of counsel, prosecutorial misconduct, and instructional error. We affirm the judgment.

FACTUAL BACKGROUND

After a young woman who lived across the street from Pogue repeatedly rebuffed his advances, he attacked her inside her home, punching her again and again in the face, stabbing her 15 times with a knife, and choking her so hard she gasped for air. He left only after she feigned death. A neighbor testified that before the attack the young woman asked him and his wife to keep an eye on her because Pogue was bothering her and that on the morning of the attack he saw Pogue outside her house.

The young woman's stepfather testified that he found a bloody tip of a knife blade in his bedroom shortly after the attack and that a friend of the young woman's found a knife handle in her bedroom a few days later. Her mother corroborated her stepfather's testimony about the discovery of the knife handle and testified that before the attack her daughter told her she felt threatened by the guy across the street.

A criminalist at the regional crime laboratory and a forensic DNA analyst at an independent laboratory analyzed blood from the crime scene. The young woman was the sole possible contributor of the blood on a swab of the tip of the knife blade. She and Pogue both were possible contributors of the blood on a swab of a sock wrapped around the knife handle.

The first officer to arrive at the crime scene testified that the young woman identified her attacker as the young man who lived across the street from her. Pogue's girlfriend testified that he was at home with her at the time of the attack.

PROCEDURAL BACKGROUND

On June 16, 2008, the district attorney charged Pogue with attempted murder (count 1; Pen. Code, § 187, subd. (a), 664, subd. (a))[1] with personal use of a deadly weapon and personal infliction of great bodily injury (§§ 12022, subd. (b)(1), 12022.7, subd. (a)), first-degree burglary (count 2; §§ 459, 460, subd. (a)), and assault with a

[1] Later statutory references are to the Penal Code except where otherwise noted.

deadly weapon (count 3; § 245, subd. (a)(1)) with personal infliction of great bodily injury (§ 12022.7, subd. (a)) on November 16, 2006.

On August 28, 2008, a jury found Pogue guilty as charged and found all the allegations true. On October 7, 2008, the court sentenced him to an aggregate 13-year prison sentence – a nine-year (aggravated) term for attempted murder consecutive to a one-year term for personal use of a deadly weapon and a three-year term for personal infliction of great bodily injury, a stayed six-year (aggravated) term for first-degree burglary, and a stayed four-year (aggravated) term for assault with a deadly weapon consecutive to a stayed three-year term for personal infliction of great bodily injury.

DISCUSSION

1. Alibi Instruction

Pogue argues that his attorney's failure to request an alibi instruction was ineffective assistance of counsel. The Attorney General argues the contrary.

The parties agree, and the record confirms, that Pogue's attorney did not request, and the court did not give, an alibi instruction. The parties agree, too, that a court, on request, has a duty to give an alibi instruction on a record of substantial alibi evidence but, in the absence of a request, has no sua sponte duty to do so. (See, e.g., *People v. Freeman* (1978) 22 Cal.3d 434, 437-439 (*Freeman*).) On that background, Pogue argues that "it would have been appropriate for defense counsel to seek pinpoint instructions explaining the sole defense theory presented by the evidence – alibi – to the jurors" since his girlfriend and his mother testified he was at home at the time of the attack.

The right to counsel protects the due process right to a fair trial not only by guaranteeing "access to counsel's skill and knowledge" but also by implementing the constitutional entitlement to an "'ample opportunity to meet the case of the prosecution.'" (*Strickland v. Washington* (1984) 466 U.S. 668, 684-686 (*Strickland*).) To establish ineffective assistance, the defendant must show that counsel's performance "fell below an

objective standard of reasonableness" and prejudiced the defense. (*Id.* at pp. 687-692; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217 (*Ledesma*).) To establish prejudice, the defendant must make a showing "sufficient to undermine confidence in the outcome" of a "reasonable probability" that but for counsel's performance "the result of the proceeding would have been different." (*Strickland, supra,* at pp. 693-694; *Ledesma, supra,* at pp. 217-218.) A reviewing court can adjudicate an ineffective assistance claim solely on the issue of prejudice without evaluating counsel's performance. (*Strickland, supra,* at p. 697.)

In *People v. Alcala* (1992) 4 Cal.4th 742, where the defense was alibi, the defendant claimed reversible error on the ground that the court failed to instruct sua sponte on alibi. (*Id.* at p. 803.) The court did instruct, however, with CALJIC Nos. 2.20 ("Believability of Witness"), 2.21.1 ("Discrepancies in Testimony"), 2.22 ("Weighing Conflicting Testimony"), 2.27 ("Sufficiency of Testimony of One Witness"), and 2.90 ("Presumption of Innocence –Reasonable Doubt – Burden Of Proof"). (*Ibid.*) "For the purpose of instructing with respect to an alibi defense, it is sufficient that the jury be instructed generally to consider all the evidence, and to acquit the defendant in the event it entertains a reasonable doubt regarding his or her guilt." (*Id.* at p. 804, citing *Freeman, supra,* 22 Cal.3d at p. 438.) Rejecting the defendant's claim as meritless, our Supreme Court held that the jury "was so instructed." (*Alcala, supra,* at p. 804.)

Here, as in *Alcala,* the court instructed the jury with CALJIC Nos. 2.20, 2.21.1, 2.22, 2.27, and 2.90. (*Alcala, supra,* 4 Cal.4th at p. 803.) Here, as in *Alcala,* the absence of an alibi instruction was harmless in light of sufficient general instruction with respect to an alibi defense. (*Id.* at p. 804.) Since the law and the record preclude Pogue from showing that "the result of the proceeding would have been different" had his attorney requested an alibi instruction (see *Strickland, supra,* at pp. 693-694; *Ledesma, supra,* at pp. 217-218), we reject his ineffective assistance of counsel argument solely on the issue

of prejudice without evaluating his attorney's performance. (See *Strickland*, *supra*, 466 U.S. at p. 697.)

2. CALJIC No. 2.90

Pogue argues that CALJIC No. 2.90 denied him due process by failing to inform the jury that the prosecution's burden of proof beyond a reasonable doubt applies to every fact necessary to establish the charged offense. The Attorney General argues the contrary.

The court instructed Pogue's jury, in relevant part, with CALJIC No. 2.90: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." He contrasts that part of CALJIC No. 2.90 with, in his words, the "*current* CALCRIM definition of the burden of proof beyond a reasonable doubt," which, he says, reads, in relevant part, "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove *each element* of a crime [and special allegation] beyond a reasonable doubt." (Former CALCRIM No. 220, italics added.)

Although Pogue characterizes the "each element" language of CALCRIM No. 220 as an "indispensable requirement" of a correct reasonable doubt instruction, that language was deleted from that instruction two years before his trial. (CALCRIM No. 220 (Aug. 2006 rev.) (2006-2007).) Ever since, the instruction has read, in relevant part, as follows: "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt." (CALCRIM No. 220.) That language is substantively indistinguishable from the language he assails in CALJIC No. 2.90, even though the latter language has withstood federal and state

constitutional challenge. (See *People v. Brown* (2004) 33 Cal.4th 382, 392, citing *Victor v. Nebraska* (1994) 511 U.S. 1; *People v. Freeman* (1994) 8 Cal.4th 450.)

People v. Ramos (2008) 163 Cal.App.4th 1082 (*Ramos*) squarely rejected an argument identical to Pogue's. (*Id.* at pp. 1087-1090.) *Ramos* held that CALCRIM No. 220 together with other instructions "adequately informed the jury that the prosecution was required to prove *each element* of the charged crime beyond a reasonable doubt." (*Id.* at p. 1089, italics added.) Here, CALCRIM No. 220 together with other instructions did just that. For example, CALCRIM No. 600 informed the jury that to find him guilty of attempted murder the prosecution had to prove he took at least one direct but ineffective step toward killing another person and intended to kill that person. CALCRIM Nos. 1700 and 1701 informed the jury that to find him guilty of first-degree burglary the prosecution had to prove he entered a building, the building was an inhabited house, and he intended at the time of entry to commit attempted murder or assault with a deadly weapon. CALCRIM No. 875 informed the jury that to find him guilty of assault with a deadly weapon the prosecution had to prove he did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person, he did the act willfully, when he did so he was aware of facts that would lead a reasonable person to realize the act by its nature would directly and probably result in the application of force to someone, and when did so he had the present ability to apply force with a deadly weapon to a person.

Additionally, *Ramos* observed that "the comparable CALJIC instruction (CALJIC No. 2.90), which for decades was the standard reasonable doubt instruction in our state, does not specify that each and every element must be proven beyond a reasonable doubt." (*Ramos, supra,* 163 Cal.App.4th at p. 1090, fn. 7.) Finally, Pogue identifies nothing in the record even intimating to the jury that the prosecution's burden of proof beyond a reasonable doubt does not apply to every fact necessary to establish the charged offense.

On appeal, the standard of review of an instruction challenged for ambiguity is whether there is a reasonable likelihood that the jury applied the instruction in a way that denied fundamental fairness. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72-73; *People v. Clair* (1992) 2 Cal.4th 629, 663.) By that standard, Pogue's CALCRIM 220 argument is meritless.

3. Argument to the Jury

Pogue argues that prosecutorial misconduct in argument to the jury denied him due process and that his attorney's failure to object was ineffective assistance of counsel. The Attorney General argues that Pogue forfeited his right to appellate review by failing to make a contemporaneous objection to each comment he characterizes as prosecutorial misconduct, that there was no prosecutorial misconduct, and that, even if there were, there was no prejudice.

To analyze the Attorney General's forfeiture argument, we turn to the portions of the record on which Pogue relies and to the differing characterizations by the parties of those portions of the record. The first instance of prosecutorial misconduct, Pogue argues, constitutes misstating the prosecutor's burden of proof beyond a reasonable doubt:

> "I will point out to you, you are not to be influenced by pity or prejudice. That's important. That means you evaluate the evidence, not the defendant. Okay? He does not get an extra hand up, and he does not get a decrease. He is treated the same as every criminal defendant, with all the rights and everything that the Judge talked about, the presumption of innocence and the requirement that I prove this case beyond a reasonable doubt.
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> "But it also means you don't give him an extra hand up. You don't go back and say, well, you know, he might be guilty of this but we are

going to cut him a break on that. That's not your duty. Your duty is first to decide the facts without pity or prejudice. Okay? What are they? Which ones are important, which facts count the most and which facts just are not, that are trivial or a side issue that don't really decide the case."

Pogue argues that the prosecutor's comments misstate the burden of proof by telling "the jurors that they could not err on the side of acquittal if they found that the defendant *might be guilty*." The Attorney General argues that the prosecutor's comments simply remind the jurors not to be influenced by pity for or prejudice against Pogue.

The second instance of prosecutorial misconduct, Pogue argues, constitutes improperly vouching for the victim and improperly denigrating his girlfriend. With reference to the victim, his challenge arises out of the following comments:

"The other thing you picked up from the 9-1-1 call, in addition to how accurate [the victim] is in terms of who her attacker is and what he did and her prior contacts with him, is you can hear the emotion, the fear. Either she is the greatest actress of all time and she is in the wrong kind of work or it's real. This really happened to her, and the defendant really did it."

With reference to both the victim and his girlfriend, Pogue's challenge arises out of the following comments:

"The last thing I would ask that you do is just remember the impact of [the victim]'s testimony. Of all the witnesses who testified over the last few days, my recollection is that only hers had that kind of power, that resonating power that tells you what she was saying was the truth. There was a silence in this courtroom that you can't fake. You can't fake that performance. Either she is in the wrong field and deserves an Academy Award, greatest actress of all time, or this is true and the defendant did this to her. Especially when you compare it to some of the other witnesses who

maybe should have been a little more emotional. [Pogue's girlfriend] was [*sic*] almost no emotion.

"She told you her story. She's been consistent. She was emotional. She was real. She cried on multiple occasions on the witness stand. The defendant did this. And, as I said, there's only one other alternative. And you would have to combine that with the defendant being the most unlucky guy in the world for all of those things to add up. And they only point towards guilt."

Pogue argues that by improperly contrasting the "less emotional demeanor" of his girlfriend with the "emotional demeanor" of the victim at trial the prosecutor's comments vouched for the victim and disparaged his girlfriend. The Attorney General argues that the prosecutor "was merely commenting on the witnesses['s] demeanor while testifying, a factor CALJIC No. 2.20 specifically told the jury they could consider when determining the believability of the witnesses."

The third instance of prosecutorial misconduct, Pogue argues, constitutes improperly appealing to the sympathy of the jurors for the victim. He grounds his claim partly in the comments he characterizes as vouching for the victim and denigrating his girlfriend and partly in later comments rejecting as "just not reasonable" the idea that Pogue's mother and girlfriend were "100 percent honest":

"It's not reasonable, and I submit to you that none of the people who testified during the prosecution's case lied to you. You saw their testimony. You were able to evaluate them. I didn't go through it yesterday, but you are able to consider their demeanor, their reaction on the witness stand. This is 2.20. Character and quality of the testimony. The demeanor and manner of the witness testifying. These are aids to guide you in judging credibility. [¶] … [The victim]'s either the greatest actress of all

time, when you consider her demeanor and manner of testimony, or she told you the truth."

Pogue argues that the prosecutor's comments improperly "appealed to the jurors' sympathy for [the victim] when he urged the jurors to consider [her] emotional state and tearfulness on the 911 recording and in court as evidence that [she] was credible." The Attorney General argues that the prosecutor's comments properly "discussed [the victim's] emotional state in the 911 tape and at trial as evidence of her believability."

The fourth instance of prosecutorial misconduct, Pogue argues, constitutes improperly attempting to shift the burden of proof by arguing an acquittal was impossible without a wholesale rejection of the prosecution's evidence:

> "It's interesting that counsel attacks every piece of evidence that directly points at his client. Her witness identifications, we went through factors every day. She passes with flying colors. So they have to find a way to chuck that out. Okay. So in addition to being either grand conspirators or incompetent, [the victim] is a liar. That's what you would have to believe to find him not guilty. [¶] You'd also have to believe that [the victim's stepfather] is in on it and he is also a big liar and completely lied to you. And [the victim's mother] is a liar. [The victim's neighbor] is a liar. [The criminalist] from the crime lab is a liar. And [the first officer to arrive at the crime scene] is a liar. But at the same time – especially when you talk about [the criminalist], who does not know Mr. Pogue, and all the officers who never met him prior to that day.
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> "… And, again, in order to find this defendant not guilty you'd have to believe not only that [the victim] lied but everybody else did and they were able to put this grand conspiracy together between eight o'clock in the morning and noon, when the defendant is arrested for the second time. Including all the DNA, the phone numbers, his booking. I mean he hadn't

even been booked yet. They are all out to get him. Therefore, he must be not guilty. It's just not reasonable. [¶] … [¶]"

"Again, you'd have to believe the officers are out to get him, and they don't know him. [The criminalist] is out to get him, even though she doesn't know him. You have to believe [the forensic DNA analyst] is incompetent. He testified that he normally gets swabs. 60 to 70 percent of the time he gets swabs. He does not get the actual items of evidence. So you have to believe there's a grand conspiracy between [the criminalist] at the D.A.'s lab and [the forensic DNA analyst] at an independent lab to try and frame him, who they don't know. It's just not reasonable."

Pogue argues that the prosecutor's comments improperly told "the jurors that they had to reject the testimony of the prosecution witnesses in their entirety to acquit." The Attorney General argues that the prosecutor's comments were "a proper response" to the evidence at trial and to the closing argument of Pogue's trial attorney.

The fifth instance of prosecutorial misconduct, Pogue argues, constitutes improperly disparaging defense counsel:

"So, ladies and gentlemen, what it bottoms out to is the defense is just throwing up anything they can to try and cloud the issues and confuse things. They don't like the DNA because it points directly at him. So they have got to make it go away. They don't like the witness identification even though she passes under every category that the law tells you to consider. They have got to get rid of that. So she must be lying. The defense just isn't reasonable. It does not match with the actual evidence in the case. [¶] … [¶] Ladies and gentlemen, bottom line is the defense is trying to throw out anything that they think you might snag onto, but none of them are reasonable. You can't have a grand conspiracy but be incompetent. You can't have a grand conspiracy but have a bunch of liars

and never get tripped up and are the greatest actresses of all time. It does not add up, it does not make sense, and it's unreasonable. And that's the burden."

Pogue argues that the prosecutor's comments improperly attacked "defense counsel's integrity." The Attorney General argues that the prosecutor's attack not on defense counsel personally but on deficiencies in the defense case was proper.

The standard of review of a prosecutorial misconduct claim is settled. (*People v. Parson* (2008) 44 Cal.4th 332, 359 (*Parson*).) A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct that requires reversal under the federal Constitution when those methods infect the trial with such unfairness as to deny due process. (*Ibid.*) Under state law, a prosecutor who uses those methods commits misconduct even when a fundamentally unfair trial does not ensue. (*Ibid.*) To preserve a claim of misconduct, a defendant must make a timely objection and request an admonition. (*Ibid.*) Only if an admonition would not have cured the harm is a claim of misconduct preserved for review. (*Ibid.*)

To prevail on an appellate claim of prosecutorial misconduct in argument to the jury, the defendant must show a reasonable likelihood that the jury understood or applied the comments at issue in an improper or erroneous manner. (*People v. Frye* (1998) 18 Cal.4th 894, 970 (*Frye*), disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) In reviewing the record, the appellate court does not "lightly infer" that the jury drew the most damaging, rather than the least damaging, meaning from the prosecutor's comments. (*Frye, supra,* at p. 970.) Our review of the record shows that the Attorney General's benign characterizations of the prosecutor's comments are consistently more plausible than Pogue's malign characterizations. Pogue's claim of "incurable" prosecutorial misconduct is not at all persuasive. Since an admonition could have cured the harm, if any, he forfeited his right to appellate review by failing to make a

contemporaneous objection to each comment he now characterizes as prosecutorial misconduct.

Even if Pogue had not forfeited his right to appellate review, the record of the compelling evidence of his guilt – the testimony of the young woman, her neighbor, her stepfather, her mother, and the first officer at the scene, together with the DNA analysis of blood from the tip of the knife blade and from the sock wrapped around the knife handle – persuades us that there is no reasonable likelihood that the jury misconstrued or misapplied the prosecutor's comments. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1304, citing *People v. Clair* (1992) 2 Cal.4th 629, 662-663.)

Finally, we turn to Pogue's ineffective assistance of counsel argument. A defendant has a duty to show that the lack of an objection was not due to a tactical decision a reasonably competent and experienced criminal defense attorney would make. (*People v. Gurule* (2002) 28 Cal.4th 557, 610-611.) An attorney may choose not to object for many reasons, and failure to object rarely establishes ineffective assistance of counsel. (*People v. Avena* (1996) 13 Cal.4th 394, 421.) That is so here. Our role is not to second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight. (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.) We reject his ineffective assistance of counsel argument.

DISPOSITION

The judgment is affirmed.

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Gomes, J.

WE CONCUR:

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Wiseman, Acting P.J.

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Hill, J.